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12 Attorneys for Defendant
13 CATERPILLAR INC.

14 UNITED STATE DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 KENNETH ORNDORF,
18 Plaintiff,

19 v.

20 CATERPILLAR INC., a Delaware
21 Corporation and DOES 1 through 50,
22 inclusive,
23 Defendants.

Case No. 5:08-cv-01276-JW

**STIPULATION AND [PROPOSED]
ORDER TO GRANT CATERPILLAR
INC. LEAVE TO AMEND ITS
ANSWER TO PLAINTIFF'S
COMPLAINT**

Judge: Hon. James Ware

24 **WHEREAS**, on April 3, 2008, the California Supreme Court in *Johnson v.*
25 *American Standard, Inc.* (Case No. S139184), adopted the Sophisticated User
26 Doctrine as an affirmative defense to negate a manufacturer's duty to warn;

27 **WHEREAS**, Caterpillar plans to amend its Answer to plaintiff Kenneth
28 Orndorf's Complaint to include an affirmative defense based on the Sophisticated
User Doctrine.

WHEREAS, a copy of Caterpillar's proposed Amended Answer is attached
hereto as Exhibit "A."

///

1 **IT IS HEREBY STIPULATED** by and between the parties to this action,
2 through their respective counsel of record as follows:

3 1. That leave for Caterpillar Inc. to file the attached amended Answer to
4 the Complaint be granted;

5 2. That the proposed amended Answer be deemed filed and served on
6 the date of any order entered pursuant to this stipulation; and

7 3. That this stipulation may be executed in counterparts and that a
8 facsimile copy of the signatures of counsel may be used in lieu of the original
9 signatures.

10
11 DATED: 5/13/08

SEDGWICK DETERT MORAN & ARNOLD LLP

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14 By: 

Elliott D. Olson
Frederic F. Grannis
Jeffrey H. Ikejiri
Attorneys for Defendant
CATERPILLAR INC.

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16
17 DATED: 5/12/08

LAW OFFICES OF ROBERT D. PONCE

18
19
20 By: 

Robert D. Ponce
Attorneys for Plaintiff
Kenneth Orndorf

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20 CATERPILLAR INC., a Delaware
21 Corporation and DOES 1 through 50,
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Case No. 5:08-cv-01276-JW

**FIRST AMENDED ANSWER BY
DEFENDANT CATERPILLAR INC.
TO COMPLAINT**

Judge: Hon. James Ware

24 Defendant Caterpillar Inc. ("Caterpillar") hereby submits its First Amended
25 Answer to the Complaint by Kenneth Orndorf ("plaintiff") as follows:

26 **FIRST CAUSE OF ACTION**

27 1. Responding to Paragraph 1 of the Complaint, Caterpillar lacks
28 knowledge or information sufficient to form a belief as to the truth or falsity of the
allegations therein, and therefore it denies such allegations.

2. Responding to Paragraph 2 of the Complaint, Caterpillar admits that
it is incorporated under the laws of the State of Delaware, and is authorized to
conduct business in the State of California. As to the remaining allegations
contained therein, Caterpillar lacks knowledge or information sufficient to form a

1 belief as to the truth or falsity of the allegations therein, and therefore it denies
2 such allegations.

3 3. Responding to Paragraph 3 of the Complaint, Caterpillar lacks
4 knowledge or information sufficient to form a belief as to the truth or falsity of the
5 allegations therein, and therefore it denies such allegations.

6 4. Responding to Paragraph 4 of the Complaint, to the extent the
7 allegations contained therein suggest or imply liability on the part of Caterpillar,
8 then the same are expressly denied. As to the remaining allegations contained
9 therein, Caterpillar lacks knowledge or information sufficient to form a belief as to
10 the truth or falsity of the allegations therein, and therefore it denies such
11 allegations.

12 5. Responding to Paragraph 5 of the Complaint, Caterpillar lacks
13 knowledge or information sufficient to form a belief as to the truth or falsity of the
14 allegations therein, and therefore it denies such allegations.

15 6. Responding to Paragraph 6 of the Complaint, Caterpillar lacks
16 knowledge or information sufficient to form a belief as to the truth or falsity of the
17 allegations therein, and therefore it denies such allegations.

18 7. Responding to Paragraph 7 of the Complaint, Caterpillar responds
19 that the model TH460B Telehandler is no a current production model. Therefore,
20 the allegations of this paragraph are denied.

21 8. Responding to Paragraph 8 of the Complaint, Caterpillar lacks
22 knowledge or information sufficient to form a belief as to the truth or falsity of the
23 allegations therein, and therefore it denies such allegations.

24 9. Responding to Paragraph 9 of the Complaint, Caterpillar lacks
25 knowledge or information sufficient to form a belief as to the truth or falsity of the
26 allegations therein, and therefore it denies such allegations.

27 10. Responding to Paragraph 10 of the Complaint, to the extent the
28 allegations contained therein suggest or imply liability on the part of Caterpillar,

1 then the same are expressly denied. As to the remaining allegations contained
2 therein, Caterpillar lacks knowledge or information sufficient to form a belief as to
3 the truth or falsity of the allegations therein, and therefore it denies such
4 allegations.

5 11. Responding to Paragraph 11 of the Complaint, Caterpillar denies each
6 and every allegation contained therein.

7 12. Responding to Paragraph 12 of the Complaint, Caterpillar denies each
8 and every allegation contained therein.

9 13. Responding to Paragraph 13 of the Complaint, Caterpillar lacks
10 knowledge or information sufficient to form a belief as to the truth or falsity of the
11 allegations therein, and therefore it denies such allegations.

12 14. Responding to Paragraph 14 of the Complaint, Caterpillar denies each
13 and every allegation contained therein.

14 15. Responding to Paragraph 15 of the Complaint, to the extent the
15 allegations contained therein suggest or imply liability on the part of Caterpillar,
16 then the same are expressly denied. As to the remaining allegations contained
17 therein, Caterpillar lacks knowledge or information sufficient to form a belief as to
18 the truth or falsity of the allegations therein, and therefore it denies such
19 allegations.

20 16. Responding to Paragraph 16 of the Complaint, Caterpillar denies that
21 any product defect caused or contributed to any of the injuries or damages alleged
22 by plaintiff. Caterpillar denies the remaining allegations contained therein.

23 17. Responding to Paragraph 17 of the Complaint, Caterpillar denies that
24 any product defect caused or contributed to any of the injuries or damages alleged
25 by plaintiff. Caterpillar denies the remaining allegations contained therein.

26 18. Responding to Paragraph 18 of the Complaint, Caterpillar denies that
27 any product defect caused or contributed to any of the injuries or damages alleged
28 by plaintiff. Caterpillar denies the remaining allegations contained therein.

1 **SECOND CAUSE OF ACTION**

2 19. Responding to Paragraph 19 of the Complaint, Caterpillar repeats and
3 incorporates herein by reference each and every response made in Paragraphs 1
4 through 18, above.

5 20. Responding to Paragraph 20 of the Complaint, Caterpillar denies each
6 and every allegation contained therein.

7 21. Responding to Paragraph 21 of the Complaint, Caterpillar denies each
8 and every allegation contained therein.

9 22. Responding to Paragraph 22 of the Complaint, Caterpillar denies each
10 and every allegation contained therein.

11 **PRAYER**

12 Answering plaintiff's prayer, Caterpillar denies that plaintiff has been
13 damaged in any fashion and further denies that plaintiff is entitled to any relief
14 whatsoever; instead, Caterpillar should be granted relief as prayed for herein.

15
16 **AFFIRMATIVE DEFENSES**

17 **FIRST AFFIRMATIVE DEFENSE**

18 **(Failure To State A Cause Of Action)**

19 23. Caterpillar alleges that the Complaint, and each and every separate
20 cause of action therein, fails to state facts sufficient to constitute any cause of
21 action against Caterpillar.

22 **SECOND AFFIRMATIVE DEFENSE**

23 **(Comparative Negligence)**

24 24. Caterpillar alleges, as to each and every cause of action, that at the
25 time of the incident alleged in the Complaint, plaintiff failed to exercise
26 reasonable or ordinary care such that the damages allegedly sustained by plaintiff,
27 either as alleged in the Complaint or otherwise, were directly or proximately
28 caused or contributed to by the negligence of plaintiff, and that such negligence

1 comparatively reduces the percentage of any negligence attributable to Caterpillar,
2 if any.

3 **THIRD AFFIRMATIVE DEFENSE**

4 **(Third-Party Comparative Fault)**

5 25. Caterpillar alleges, as to each and every cause of action, that the
6 incident alleged in the Complaint and the damages allegedly sustained by plaintiff,
7 if any, either as alleged in the Complaint or otherwise, were directly or
8 proximately caused or contributed to by the negligence or fault of persons or
9 entities other than Caterpillar, and that such negligence or fault of others
10 comparatively reduces the percentage of any negligence or fault attributable to
11 Caterpillar, if any.

12 **FOURTH AFFIRMATIVE DEFENSE**

13 **(Non-Economic Losses are Several)**

14 26. Caterpillar alleges that the sole and/or partial proximate cause of the
15 damages claimed was the carelessness, recklessness, negligence, fault and/or strict
16 liability of plaintiff and/or other persons, firms or entities, and plaintiff's recovery,
17 if any, should be proportionately reduced according to the percentage of fault of
18 said persons, firms and/or entities, and that Caterpillar be found legally
19 responsible only for its determined share of legal fault, if any, by virtue of the
20 provisions of Civil Code § 1431, *et seq.*

21 **FIFTH AFFIRMATIVE DEFENSE**

22 **(Willful and Intentional Acts of Others)**

23 27. Caterpillar alleges that the sole and/or partial proximate cause of the
24 damages claimed was the willful and/or intentional acts of other persons, firms or
25 entities.

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1 **SIXTH AFFIRMATIVE DEFENSE**

2 **(Misuse of Product)**

3 28. Caterpillar asserts that the alleged injuries and damages in question, if
4 any, were the result of unreasonable, unforeseeable misuse, abuse and/or improper
5 maintenance and/or service of the product in question.

6 **SEVENTH AFFIRMATIVE DEFENSE**

7 **(Alteration of Product)**

8 29. Caterpillar is informed and believes and upon such information and
9 belief alleges that the product in question was altered after it left the control, if
10 any, of Caterpillar, and that this alteration of the product proximately caused the
11 alleged defect or nonconformity, if any, resulting in the injuries, losses and
12 damages complained of, if there were any.

13 **EIGHTH AFFIRMATIVE DEFENSE**

14 **(Indemnification)**

15 30. Caterpillar contends that, if it is held liable for the events and
16 occurrences as set forth in the Complaint, which Caterpillar denies, said liability
17 will be based solely on a derivative form of liability not resulting from the
18 negligent conduct of Caterpillar, but instead arising only from an obligation
19 imposed by law. As such, Caterpillar would be entitled, and is entitled, to
20 complete and totally implied indemnity.

21 **NINTH AFFIRMATIVE DEFENSE**

22 **(Apportionment of Damages)**

23 31. Caterpillar alleges that, if it is found liable to the plaintiff, which
24 Caterpillar denies, and any other defendants at the time of trial in this action are
25 also liable, then as a result the damages sustained by plaintiff, if any, liability must
26 be apportioned based on the principles of comparative negligence, Civil Code §
27 1431 *et seq.*, and all other applicable law.
28

1 **TENTH AFFIRMATIVE DEFENSE**

2 **(Benefits Outweigh Risk of Danger)**

3 32. Caterpillar alleges, in light of the relevant factors, on balance, that the
4 benefits of the design in question outweigh the risk of danger, if any, inherent in
5 that design.

6 **ELEVENTH AFFIRMATIVE DEFENSE**

7 **(Off-Set of Worker's Compensation Benefits)**

8 33. Caterpillar alleges, as to each cause of action, that at the time of the
9 damages alleged in the Complaint, plaintiff was employed and that he was entitled
10 to and did receive worker's compensation benefits from said employer, that his
11 employers and co-employees were negligent in and about the matters referred to in
12 the Complaint, and that such negligence on the part of said employer and co-
13 employees proximately and concurrently contributed to the happening of the loss
14 and damages complained of by plaintiff, if any; and that by reason thereof,
15 Caterpillar is entitled to a set-off of any such benefits received or to be received by
16 plaintiff from the employer, and further that Caterpillar is entitled to have any
17 recovery by plaintiff from the employer reduced proportionately according to the
18 current law regarding recovery of worker's compensation benefits.

19 **TWELFTH AFFIRMATIVE DEFENSE**

20 **(Intervening or Superseding Cause)**

21 34. Caterpillar alleges the incident and damages complained of by
22 plaintiff, if there actually were any, were proximately caused, contributed to,
23 aggravated, exacerbated and/or enhanced by the acts or omissions of persons or
24 entities other than Caterpillar. Said acts or omissions were an intervening and/or
25 superseding cause of such injuries and damages, thus barring plaintiff from any
26 recovery against Caterpillar.

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28

1 **THIRTEENTH AFFIRMATIVE DEFENSE**

2 **(State of the Art)**

3 35. Caterpillar alleges that at all relevant times its product conformed to
4 generally accepted industry standards and was safe for its intended uses and, as
5 such, the product was “state of the art” at the time of the incident alleged in
6 plaintiff’s Complaint.

7 **FOURTEENTH AFFIRMATIVE DEFENSE**

8 **(Failure to Mitigate)**

9 36. Caterpillar alleges that plaintiff, with full knowledge of his damages,
10 if any, failed to mitigate such damages.

11 **FIFTEENTH AFFIRMATIVE DEFENSE**

12 **(Statute of Limitations)**

13 37. Caterpillar alleges that the causes of action set forth in plaintiff’s
14 Complaint are barred by the applicable statute of limitations as stated in California
15 Code of Civil Procedure §§ 335 and continuing through § 349.4 and, more
16 particularly but not limited to, § 335.1.

17 **SIXTEENTH AFFIRMATIVE DEFENSE**

18 **(Assumption of Risk)**

19 38. Caterpillar alleges that the Complaint, and each cause of action
20 therein, is barred on the grounds that plaintiff assumed the risk of the incident,
21 injuries or damages alleged in the Complaint, if any.

22 **SEVENTEENTH AFFIRMATIVE DEFENSE**

23 **(Prior Knowledge of Defect)**

24 39. Caterpillar alleges, as to each and every cause of action, that the
25 subject product was used after the defect alleged in the Complaint, the existence of
26 which Caterpillar generally and specifically denies, was known or in the exercise
27 of reasonable or ordinary care should have been known.
28

1 **EIGHTEENTH AFFIRMATIVE DEFENSE**

2 **(Condition of Product Open and Obvious)**

3 40. Caterpillar alleges, as to each and every cause of action that at the
4 time of the incident alleged in the Complaint, the condition claimed to be
5 dangerous by plaintiff was patently obvious and known, or in the exercise of
6 reasonable or ordinary care should have been known, to plaintiff or to persons or
7 entities other than Caterpillar.

8 **NINETEENTH AFFIRMATIVE DEFENSE**

9 **(No Duty to Warn)**

10 41. Caterpillar alleges that it had no duty to warn of any alleged risk
11 associated with the use of its product because such alleged risks were
12 unforeseeable and/or because any such alleged risks were open, obvious, and
13 known to plaintiff.

14 **TWENTIETH AFFIRMATIVE DEFENSE**

15 **(Duty to Warn Fulfilled)**

16 42. Caterpillar alleges that even if it had a duty to warn, which allegation
17 is expressly denied, Caterpillar at all times fulfilled its alleged duty to warn of the
18 known risks associated with the subject product.

19 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

20 **(Sophisticated User)**

21 43. Caterpillar alleges that plaintiff Kenneth Orndorf was a sophisticated
22 user of the subject product and thus knew or should have known of the potential
23 dangers and hazards created by his conduct at the time of the incident, and that
24 Caterpillar thus had no duty to warn plaintiff of the dangers and hazards alleged
25 by him in his Complaint of which he was or should have been aware.

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1 WHEREFORE, Caterpillar prays:

- 2 1. That plaintiff take nothing by his Complaint;
- 3 2. That the Complaint be dismissed with prejudice and that judgment be
- 4 awarded in favor of defendant Caterpillar Inc.;
- 5 3. That Caterpillar Inc. be awarded its costs of suit herein; and
- 6 4. That Caterpillar Inc. be awarded such other and further relief as this
- 7 Court deems just and proper.
- 8

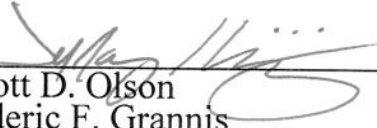
9 DATED: May 13, 2008

SEDGWICK DETERT MORAN & ARNOLD LLP

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11

12 By:



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